

NTSB Order No. EA-4997

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of September, 2002

Respondent .

Docket SE-16638

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on August 22, 2002, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge reversed an emergency order of the Administrator that revoked the respondent's mechanic certificate on the ground that he had

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refused to submit to a drug test, in violation of section 65.23(b) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 65. For the reasons discussed below, we will grant the Administrator's appeal and reinstate the revocation order.²

The Administrator's July 18, 2002 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. At all times mentioned in this document, you are [sic] the holder of Mechanic Certificate No. 267713773, with Airframe and Powerplant ratings, issued under 14 CFR Part 65.
2. During the events identified in this document, you were employed to perform aircraft maintenance or preventive maintenance duties for Northwest Airlines, Inc. ("Northwest Airlines").
3. At all times mentioned in this document, Northwest Airlines is [sic] an employer subject to the provisions of 14 CFR Part 121, Appendix I.
4. At all times mentioned in this document, 14 CFR Part 121, Appendix I, [section] V.C. requires [sic] employers subject to the provisions of Appendix I to implement a reasonable program of unannounced, random drug testing of each individual who has been hired to perform safety-sensitive functions as defined in that appendix.
5. At all times mentioned in this document, safety-sensitive functions include [sic] aircraft maintenance or preventive maintenance duties under 14 CFR Part 121, Appendix I, [section] III.
6. On or about May 16, 2002:
 - a. At approximately 4:45 p.m., Northwest Airlines supervisor, Dan Clipper, notified you that you had been selected for random drug testing and needed to report to the Northwest Airlines collection site for testing as soon as possible.³
 - b. You reported to the collector, Manuel Ortiz, at the collection site and made your first attempt to provide a urine specimen at approximately 4:50 p.m.

²Respondent has filed a reply brief opposing the appeal.

³At the hearing, the law judge, at respondent's suggestion, amended, without objection, this allegation to replace 4:45 p.m. with 3:30 p.m.

- c. You informed the collector that you were unable to provide a urine specimen.
 - d. The collector informed you that you should drink water and that you had up to three hours to provide a urine specimen.
 - e. You made a second attempt to provide a urine specimen at approximately 6:10 p.m.
 - f. You made a third attempt to provide a urine specimen at approximately 6:45 p.m.
 - g. You made a fourth attempt to provide a urine specimen at approximately 7:52 p.m.
 - h. During the period of time between your first attempt to provide a urine specimen at approximately 4:50 p.m. and your last attempt at approximately 7:52 p.m., you drank water.
 - i. During the period of time between your first attempt to provide a urine specimen at approximately 4:50 p.m. and your last attempt at approximately 7:52 p.m., you drank a 12 ounce can of soda pop.
 - j. You did not produce a urine specimen after any of the four attempts you made to provide a urine specimen to the collector on May 16, 2002.
 - k. The collector discontinued the collection after your fourth, unsuccessful attempt to provide a urine specimen and, in your presence, informed Northwest Airlines Designated Employee[r] Representative ("DER"), Tim Bishop, by telephone about your collection.
 - l. The DER spoke with you over the telephone and informed you that you would need to undergo a medical evaluation within 5 days to determine if there was a medical condition that was causing your inability to produce a sufficient specimen.
7. On or about May 17, 2002, Daniel Lussenhop, M.D., Park Nicollet-Airport Clinic, Minneapolis, Minnesota, examined you for the purpose of assessing your shy bladder situation.
 8. Based on his examination, Dr. Lussenhop reported to Northwest Airlines Medical Review Officer ("MRO"), David Zanick, M.D., that he was unable to determine a medical condition which would prevent you from providing a urine specimen for drug testing.
 9. On May 20, 2002, Dr. Zanick verified the result of your failure to provide a sufficient specimen for testing on May 16, 2002, as a refusal to test because there was no medical condition discovered that could have prevented you from providing a urine specimen.
 10. Procedures for Transportation Workplace Drug and Alcohol Testing, 49 CFR § 40.191(a)(5), provides that, "[a]s an employee, you have refused to take a drug test if you ... [f]ail to provide a sufficient amount of urine when directed, and it has been determined that there was no

- adequate medical explanation for the failure....
11. By reason of the foregoing, you refused to take a drug test required under 14 CFR Part 121, Appendix I.

The law judge reversed the revocation order on the grounds that the collector had not given the respondent a full three hours within which to provide a urine sample and had not advised the respondent to drink up to 40 ounces of water.

On appeal, the Administrator argues, first, that the law judge abused his discretion by allowing the respondent, over the Administrator's objection, to change his answer to paragraph 6(b) of the complaint from an admission to a denial.⁴ We agree. The Board's Rules of Practice expressly and unequivocally limit a law judge's discretion to permit an amendment to a pleading at the hearing to instances where good cause for the change has been shown. See Rule 821.55(e), 49 C.F.R. Section 821.55(e). Here, the respondent gave no reason on the record for the requested amendment and the law judge gave no reason in support of his decision to allow it.⁵ We will, accordingly, vacate his arbitrary grant of the amendment,⁶ strike the testimony of

⁴The Emergency Order of Revocation served as the complaint.

⁵Counsel for respondent asserts on brief that he gave reasons for the requested amendment in a pre-hearing session with the law judge. Aside from the fact that the reasons he says he gave, essentially oversight resulting from the need for expedition in an emergency case, would not satisfy the good cause standard, it is highly improper to refer to such off-the-record discussions. We give his comments in this connection no weight.

⁶The Administrator, no less than any other party appearing before our law judges, is entitled to fair and unbiased treatment. We would admonish our judges to take pains to ensure that the due process rights of all parties are unerringly respected.

respondent and the other evidence advanced to the effect that his first failed attempt to provide a urine specimen did not occur until 15 or 20 minutes after he arrived at the testing site at 4:45 p.m. (i.e., between 5:00 and 5:05 p.m.), and reverse the law judge's derivative finding that respondent did not receive a full three-hour period within which to provide a suitable specimen for testing.⁷

The Administrator next argues that the law judge erred by concluding that the collection process was fatally flawed because the collector, albeit recommending that respondent drink some water to remedy his apparent difficulty in providing a specimen,

⁷The three-hour period under the applicable regulations is calculated from the time of the first unsuccessful attempt. The complaint's admitted allegations (paragraphs 6(b) and (g)) established that this period ran from 4:50 p.m. to 7:52 p.m. By withdrawing his earlier admission that the first failed attempt occurred at 4:50 p.m., the respondent was free to claim that he had actually finished his first attempt to provide a urine specimen at some later point in time, thereby enabling him to argue that he had not been given a full three hours. It would appear, however, that respondent would have had more than three hours to provide an adequate sample even if the clock had started running between 5:00 and 5:05 p.m., as respondent sought to establish. According to the record (see pp. 99-104), the collector, after respondent's fourth failed attempt at 7:52 p.m., called the DER, Mr. Bishop, to give him a report. Mr. Bishop testified that he received a page from the collector "a little bit after 8:00 o'clock." He first spoke to the collector to find out if all required procedures had been followed. He then asked to speak to the respondent. After explaining to respondent who he was and why he had been called, he asked respondent if he were sure he could not go. Respondent answered that he could not. It is reasonable to assume that this conversation transpired sometime later than 8:05 p.m. In other words, the record would support a finding, even if the respondent had had a valid reason for withdrawing his admission to paragraph (b), that more than three hours had elapsed between his first attempt and the opportunity Mr. Bishop essentially gave him when he inquired, in effect, if he wanted to try one more time. The law judge's contrary decision ignored this evidence.

may not have specifically told him he could or should drink up to 40 ounces of water. Once again, we agree that the law judge's decision in this respect must be overturned.

We recognize that the U.S. Department of Transportation regulations applicable to the testing performed in this case direct the collector to "urge the employee to drink up to 40 ounces of water, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first..." (49 CFR Section 40.193(b)(2)).⁸ There is, however, no basis in the regulatory history for concluding that a test should be invalidated if the collector did not himself dispense to the respondent measured cups of water totaling 40 ounces, as the law judge suggests he needed to do, and there is no showing on this record that such a procedure is utilized by those performing drug testing for Northwest Airlines or anyone else.⁹ Moreover, the regulatory history does not suggest that 40 ounces was selected because of any judgment that drinking that quantity of water would produce any specific amount of urine for a specimen. Rather, it was selected essentially as a *cap* on the amount of water an

⁸A sufficient specimen would be a minimum of 45 mL, or about one and a half fluid ounces. It does not appear that respondent provided any urine specimen. The regulations do not give the collector discretion to extend the testing period beyond three hours, and a collector has no authority to require anyone to drink water or any other liquid.

⁹It cannot be determined on this record whether respondent drank more or less than 40 ounces of water. He did, however, avail himself of the water fountain four or five times and drank a 12-ounce soda.

individual should consume without raising concerns over water intoxication or dilution of a specimen. See 61 Fed. Reg. 37693 (1996).

There is no indication that either respondent or his union representatives, who also urged him to drink water and observed nothing aberrant about the conduct of the testing, did not appreciate the direct biological relationship between the consumption of liquids and the production of urine. In any event, it was respondent's responsibility, as a transportation worker engaged in a safety-sensitive function, to allow himself to be tested for drug use that could affect his ability to safely perform his job. His failure, without medical justification, to discharge that responsibility was in no way, logically or legally, attributable to anything the collector did or did not do, and it constituted a refusal to submit to testing, in violation of regulations, notwithstanding the law judge's assessment that the testing protocol could be read to require a more structured process than occurred in this instance or than, so far as this record shows, ever occurs.

We understand that the drug testing regulations are not popular among those subject to their reach. We also understand that revocation may seem a harsh sanction in a case such as this one where there is no actual determination or showing of illicit drug usage. Nevertheless, the regulations embody a judgment that the failure to provide a sufficient urine specimen may reflect an

effort to evade a positive drug test result,¹⁰ and our precedent holds that a refusal to be tested warrants revocation.

Administrator v. Krumpster, NTSB Order No. EA-4724 (1998).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The Emergency Order of Revocation is affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur, and did not submit a dissenting statement.

¹⁰It is neither within the power or prerogative of our law judges to second-guess or attempt to circumvent that judgment.